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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

STEVEN D. FREDERICK,
Petitioner

vs.

JOHN STEPANIK, SUPERINTENDENT,
STATE CORRECTIONAL INSTITUTION
AT DALLAS, PENNSYLVANIA;
ERNIE PREATE, ATTORNEY GENERAL,
COMMONWEALTH OF PENNSYLVANIA; AND
THE DISTRICT ATTORNEY OF BERKS COUNTY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's Fifth and Sixth Amendment rights were violated when trial counsel failed to move to suppress the testimony of the chief prosecution witnesses and "jailhouse informants" at trial, both of whom acted as police agents in extracting incriminating statements from Petitioner in prison while he was the prime suspect in the subject murder and later under arrest and awaiting trial for it?

LIST OF ALL PARTIES

The parties to this habeas corpus action are: Steven D. Frederick, Petitioner herein, by and through his counsel of record, William C. Costopoulos, Esquire; and John Stepanik, Superintendent, State Correctional Institution at Dallas, Pennsylvania; Ernie Preate, Attorney General, Commonwealth of Pennsylvania, and the District Attorney of Berks County (Pennsylvania), by and through their counsel of record, Iva C. Dougherty, Assistant District Attorney, Berks County, Reading, Pennsylvania.

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REFERENCE TO OPINIONS BELOW

The only opinion delivered in this case is the report of the United States Magistrate Judge dated December 9, 1992, which was adopted as the opinion of the United States District Court and is reproduced in the Appendix beginning at page A53.

STATEMENT OF JURISDICTION

This petition for a writ of certiorari is from the judgment order of the United States Court of Appeals for the Third Circuit entered on May 5, 1994, which affirmed the District Court's denial of Petitioner's application for a writ of habeas corpus in the matter docketed to No. 93-1255.

Your Honorable Court has jurisdiction of this matter pursuant to Sections 1254(1), 1651 and 2254 of Title 28, United States Code (28 U.S.C. § 1254(1), 1651 and 2254).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment to the United States Constitution

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]"

Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

This petition for writ of certiorari to the Third Circuit arises from the denial of Mr. Frederick's application for writ of habeas corpus.

Following a trial by jury, Petitioner was convicted of first-degree murder, aggravated assault, robbery and theft in the Court of Common Pleas, Berks County, Pennsylvania on May 23, 1977. He was sentenced to life imprisonment. The charge were based on the murder of Dureme Kunkel at her home in Topton, Berks County, on February 12, 1975.

After the victim's body was discovered, Mr. Frederick was questioned repeatedly by the police, especially Pennsylvania State Police Lt. Donald Holloway beginning on

February 14, 1975. According to Holloway, Petitioner was the focus of the investigation shortly after the body was found. On March 5, 1975, Petitioner was arrested for a parole violation and incarcerated in the Berks County Prison.

On March 20, 1975, Lt. Holloway went to the Berks County Prison where he met with Arlan Schaedler for the first time in connection with this case. Lt. Holloway recalled that the meeting took place in the daylight hours because the warden was there. The first note of Mr. Schaedler, purporting to be a written memorandum of Petitioner's admissions, was dated March 20, 1975 and timed at 8:20 p.m., or after his initial meeting with Lt. Holloway.

Lt. Holloway denied, at the state Post-Conviction Relief Act (PCRA) hearing,

instructing Arlan Schaedler to obtain evidence linking Petitioner to the murder. However, the trial prosecutor represented to the trial judge, on the record in an offer of proof, that Lt. Holloway would testify that he did communicate with Schaedler on March 20, 1975 and that he provided Schaedler with questions to ask Mr. Frederick:

MR. MORRISEY:

> This witness will testify that he is a member of the Pennsylvania State Police, that on March 20th, 1975, he visited the Berks County Prison and talked to one Arlan Schaedler who advised him that he had information regarding the murder of Dureme Kunkel, and further

communicated with Schaedler concerning the murder of Dureme Kunkel and provided him questions to ask Frederick which were in fact false in nature and false leads to determine whether or not Schaedler would report the same thing back or change them, of which Mr. Schaedler did report back to him, after communicating with Mr. Frederick, was false.

Mr. Frederick presented the following written evidence of record documenting the police-agent status of Mr. Schaedler:

(a) In a memorandum written by Mr. Schaedler to Lt. Holloway dated March 22, 1975, Mr. Schaedler asked him: "What's my next move?"

(b) In a written memorandum dated

March 26, 1975, Mr. Schaedler asked Lt. Holloway: "What do you advise me to do?" and

(c) In a note dated April 3, 1975 (the day before the criminal complaint was filed against Petitioner), Mr. Schaedler asked Lt. Holloway: "What's next?".

Based in large part on the information Mr. Schaedler provided Lt. Holloway at the latter's request, Mr. Frederick was arrested and charged with the murder and other counts on April 5, 1975.

The record also includes evidence suggesting that Edward Klusewitz, the other jailhouse informant, also acted as a police agent on behalf of Lt. Holloway and testified falsely against Petitioner at trial. In April of 1975, while incarcerated at the Schuylkill County Prison, Mr.

Klusewitz was transported to the Spring Township police department in Berks County and charged with eleven burglaries:

(a) while Mr. Klusewitz was in a holding cell for two days, Lt. Holloway and another officer visited him and stated their desire for information on Petitioner;

(b) according to Mr. Klusewitz, they offered him a 6 to 36 month sentence on his pending burglary charges; and

(c) Mr. Klusewitz, the next day, was returned to the Schuylkill County Prison. Within a week, on April 5, 1975, Mr. Frederick was arrested for the murder and housed not in the Berks County Prison (the county with jurisdiction) but rather in the Schuylkill County Prison where he was placed in a cell directly opposite the cell in which Klusewitz was incarcerated. Trooper

Robert R. Sease, however, testified at the PCRA hearing that Petitioner was taken to the Schuylkill County Prison upon his arrest because Schaedler, who had provided incriminating evidence against him, was already incarcerated at the Berks County Prison. The record demonstrated that (a) Schaedler, in fact, was released from the Berks County Prison on the very day of Petitioner's arrest (April 5, 1975); and (b) Trooper Sease knew that Schaedler had been released the day Petitioner was arrested because Trooper Sease arrested Petitioner at the PSP barracks on April 5, 1975 and arranged to have Schaedler present there.

Shortly after his incarceration at Schuylkill County Prison, Lt. Holloway began receiving notes from Mr. Klusewitz containing incriminating evidence allegedly

garnered from Petitioner subsequent to his arrest. Klusewitz testified from these notes at trial. At the PCRA hearing, Mr. Klusewitz testified that most of his testimony at Petitioner's trial was false. Mr. Klusewitz also testified that Mr. Schaedler told him, in a holding cell at Petitioner's trial, that Mr. Schaedler's testimony was untruthful and was intended to secure a more lenient sentence. The Klusewitz recantation was rejected by the PCRA Court (which also rejected Schaedler's recantation even though he hadn't testified).

Five exhibits were introduced into evidence at the PCRA hearing. These exhibits were letters written by Mr. Klusewitz and sent to the Pennsylvania Attorney General's Office in 1983 and

produced from that Office's files. The letters state Mr. Klusewitz had given false testimony in several trials in Berks County, including Petitioner's, and that he had acted as a police agent in obtaining incriminating information. Their content can be summarized as follows:

(a) beginning in February 1983, years before the PCRA petitioner was filed, Klusewitz began writing to the Attorney General's Office: "In most of these cases I was told or briefed as to what to say. I know I will have to face perjury charges as a result of some of the cases."

(b) On February 24, 1983, Klusewitz sent the Attorney General's Office another letter (notarized) specifically stating that he had testified falsely in three (3) murder trials, including Petitioner's.

(c) Agent Daniel McFadden of the Attorney General's Office received a letter from Klusewitz dated March 26, 1983, in which Klusewitz outlined the recantation of his testimony at Petitioner's trial.

(d) Klusewitz provided Agent McFadden with a detailed recantation in a letter received by the Attorney General's Office in September 1983:

> I was contacted by a Lt. Holloway State Police, while I was confined at Spring Township Police Station. Lt. Holloway asked me to get some information on Steven Freddricks [sic] on a murder he was charged with. I was told by the Lt. I would get a 6 to 36 month sentence for 11 burglarys [sic] I was charged

with. They would transfer Steve to the County prison I was in so I could get this information and send it back to them through the Warden of the prison. He would make sure the State Police would receive the papers I wrote. I turned about 12 pages of information that I said Steve told me about the murder. Most of the information was false I made it up.

Steve was convicted of 2nd degree murder. His conviction resulted from my testimony and a man named Arlan Schaedler, I talked to this man Arlan he told me all his testimony was made up. Because he had a lot of charges

against him from the State Police which he was going to get dropped for his testimony against Freddricks [sic]. I talked to him while we were in the courthouse waiting for the trial on Freddricks [sic] to begin. Arlan was classified as an expert witness too. And was know [sic] to lie so he could get his charges dropped like me. As my testimony was false too.

(e) These letters, which were provided by the Attorney General's Office itself, were sent first in 1983, more than five years before Petitioner filed his PCRA petition.

At the PCRA hearing, Lt. Holloway candidly

testified that he would put Schaedler "in the same class as Klusewitz, they're both liars."

Last, Mr. Frederick has adduced evidence of his innocence of the murder based on the trial record itself. According to the Commonwealth's own evidence presented at trial, Petitioner had an alibi at the time the murder was perpetrated:

(a) Roger Kunkel, the victim's son, testified that he last spoke with his mother on the telephone at 11:10 p.m. on February 11, 1975, at which time there was no evidence of problems or distress;

(b) another Commonwealth witness, Abraham Brown, the owner of the Red Lion Inn, testified that Petitioner came into the establishment at about 11:15 p.m. or 11:20 p.m. on February 11, 1975, was "quite

happy," bought some other patrons a beer, and stayed until about 12:35 a.m. or 12:40 a.m. on February 12, 1975;

(c) according to the Commonwealth's own theory of the case, Petitioner -- in the span of 5 or 10 minutes -- broke into the victim's home, bludgeoned her some 30 times to death, seized a money box, went through the house, got into his car, and drove 5 or 6 miles to the Red Lion Inn; and

(d) the prosecutor, at trial, specifically informed the trial judge in response to his inquiry that the Commonwealth's theory of the case was that Petitioner went to the Inn after the murder.

Following a trial by jury, Mr. Frederick was convicted as charged on May 23, 1977. Timely post-trial motions were filed on May 31, 1977. Mr. Frederick filed an additional

post-trial motion raising an ineffective assistance of counsel issue on September 18, 1979. An evidentiary hearing was held on January 3, 1980. In an order and opinion issued on March 5, 1980, Judge Hess denied all the post-verdict motions, including the ineffectiveness claim. Judgment of sentence was formally imposed on June 5, 1980.

A direct appeal to the Supreme Court of Pennsylvania was filed on July 3, 1980 and was denied, per curiam, on May 27, 1983.

On December 2, 1988, by and through undersigned counsel, Mr. Frederick filed a state PCRA petition with the Court of Common Pleas, Berks County, Pennsylvania. On February 24, 1989, a supplemental PCRA petition was filed. An evidentiary hearing was held on March 6 and 7, 1989 before the Honorable Thomas J. Eshelman. The PCRA

petitions were denied on March 28, 1989 by Judge Eshelman and a supporting opinion was issued on January 1990.

Mr. Frederick then filed a timely appeal to the Superior Court of Pennsylvania on April 19, 1989, which affirmed the lower court's order on July 23, 1990, in a memorandum opinion. Petitioner timely filed a petition for allowance of appeal with the Supreme Court of Pennsylvania, which was granted on June 6, 1991. Briefs were filed and oral argument was held before the Court on January 24, 1992. On February 14, 1992, in a per curiam order, the Court affirmed the Superior Court's order; Justices Larsen and Cappy dissented. See: Commonwealth v. Frederick, 601 A.2d 807 (1992). Petitioner therefore has exhausted his state appellate remedies. See, e.g., Toulson v. Beyer, 987

F.2d 984 (3rd Cir.1993).

On or about September 10, 1992, Mr. Frederick filed an application for writ of habeas corpus under 28 U.S.C.A. 2254. On December 9, 1992, United State Magistrate Judge James R. Melinson filed a report and recommendation in which he recommended that the petition be dismissed without hearing and that there was no probable cause for appeal. Timely objections were denied by the Honorable E. Mac Troutman, United States District Senior Judge, who filed an order and opinion entered on February 16, 1993, adopting the recommendation of Magistrate Judge Melinson denying the application and refusing to grant a certificate of probable cause for appeal.

On March 15, 1993, Mr. Frederick timely filed both a notice of appeal and a request

for certificate of probable cause with the Third Circuit. By order dated October 26, 1993, the Court (Hon. Becker, Nygaard and Roth, Circuit Judges) granted the request for certificate of probable cause. After briefing, the Third Circuit affirmed the District Court's judgment in an order entered on May 5, 1994.

REASONS FOR ALLOWANCE OF WRIT

Petitioner's Fifth and Sixth Amendment rights were violated when trial counsel failed to move to suppress the testimony of the chief prosecution witnesses and "jailhouse informants" at trial, both of whom acted as police agents in extracting incriminating statements from Petitioner in prison while he was the prime suspect in the subject murder and later under arrest and awaiting trial for it.

Mr. Frederick was convicted of murder on the basis of incriminating statements extracted deliberately by two police agents while he was incarcerated. One inmate, Edward Klusewitz, elicited such admissions at the behest of the police after Petitioner had been formally charged and was awaiting

trial and the other, Arlan Schaedler, garnered his statements under police direction while he was the chief and only suspect, in custody, and on the verge of being charged. These legal conclusions are not based on the rejected recantation testimony of Klusewitz. Because Mr. Frederick's constitutional rights to counsel and against self-incrimination were abridged as a result, in contravention of this Honorable Court's precedent in this area, a writ of habeas corpus should issue.

Since 1964, in Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), this Court has held that the police may not circumvent an accused's right to counsel by engaging an agent to obtain incriminating statements deliberately from him after indictment. This was the

state of the law in 1975 at the time of Petitioner's arrest. This principle was further enunciated in United States v. Henry, 477 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), which applied the Massiah test to incriminating statements made to a jailhouse informant and concluded that the government agent "deliberately used his position to secure incriminating information from [the defendant] when counsel was not present." 65 L.Ed.2d at 115. As summarized by the Pennsylvania Supreme Court:

"The Supreme Court of the United States has held that where an individual acts under instructions as a paid informer for the government, where he presents himself as no more than a fellow inmate rather than an agent of the government, and where the

suspect is in custody and under indictment at the time of his questioning by the secret agent, the information secured by the agent must be suppressed." (citation omitted.) Commonwealth v. Berkheimer, 501 Pa. 85, 460 A.2d 233, 234 (1983). More recently, the High Court in Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), reaffirmed its ruling that once the Sixth Amendment right to counsel has attached, law enforcement authorities may not employ an undercover agent to record conversations with an accused and elicit incriminating statements. That Court said:

"The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. . . . [T]his guarantee includes the State's

affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever -- by luck or happenstance -- the State obtains incriminating statements from the accused after the right to counsel has attached. . . . However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains

incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." Id., 106 S.Ct. at 487; emphasis supplied.

In its latest pronouncement in this area, this Honorable Court in Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), held that "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." 91 L.Ed.2d at 384-385. The informant had an adjoining jail cell and merely listened to the defendant and reported to the police on his conversations with him. However, the Kuhlmann Court reaffirmed Massiah and noted that "the primary concern of the Massiah

line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." 91 L.Ed.2d at 384.

The deliberate police efforts to obtain incriminating statements from Mr. Frederick through an informant mandate the issuance of a writ of habeas corpus here. Petitioner was arrested and charged with the instant murder on April 5, 1975, while already in custody for unrelated reasons. Clearly under the Federal standard enunciated in Massiah v. United States, supra, and progeny, any statements given by Petitioner to Edward Klusewitz -- a police agent -- should have been suppressed because the police circumvented his right to counsel, a right that had attached upon his arrest at least. Trial counsel were ineffective for

not so attempting to suppress, for this was the very state of the law in April 1975. In addition, Mr. Frederick respectfully submits that Maine v. Moulton, supra is not limited to the post-indictment stage but may well recognize, under certain special instances, the attachment of the right to counsel, where the prosecution -- though on the edge of filing a formal criminal complaint -- pauses precisely to secure the services of an agent in order to obtain an admission or confession and, thereafter, bring formal charges against the accused. ("The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State.")

While a defendant is the primary, exclusive suspect of the police, is then put

into custody on unrelated charges, and he is about to be arrested and charged though the prosecution team intentionally waits for the obtaining of an incriminating statement to make its case airtight, the same right to counsel should attach. For both reasons and as to both Klusewitz and Schaedler, trial counsel were ineffective for failing to suppress this evidence and, therefore, Mr. Frederick must be afforded a new trial.

Although Lt. Holloway denied, at the state PCRA hearing, instructing Schaedler to obtain evidence linking Petitioner to the murder, the trial transcript clearly indicates otherwise, for the prosecutor represented to the Trial Court in an offer that Lt. Holloway was going to testify that he did communicate with Schaedler on March 20 and, in fact, went so far as to provide

him with questions to ask Petitioner:

MR. MORRISEY:

This witness will testify that he is a member of the Pennsylvania State Police, that on March 20th, 1975, he visited the Berks County Prison and talked to one Arlan Schaedler who advised him that he had information regarding the murder of Dureme Kunkel, and further communicated with Schaedler concerning the murder of Dureme Kunkel and provided him questions to ask Frederick which were in act false in nature and false leads to determine whether or not Schaedler would report the same thing back or change them, of which Mr. Schaedler did report

> back to him that the false information given to him, after communicating with Mr. Frederick, was false.

Because this solicitation by Lt. Holloway of Schaedler occurred prior to the first incriminating statements "documented" by Schaedler, the only possible inference to be drawn is precisely that this information was obtained as a direct result of Lt. Holloway's visit to Schaedler in which, according to the trial prosecutor, Schaedler was given questions by the police officer to ask Petitioner.

Further evidence points to Schaedler operating as Lt. Holloway's man on the inside. In a memorandum written by Schaedler to Lt. Holloway dated March 22, 1975, Schaedler asks him: "What's my next

move?". In a written memorandum dated March 26, 1975, Schaedler inquires of Lt. Holloway: "What do you advise me to do?" And Schaedler questions Lt. Holloway, in a note dated April 3, 1975 (the day before the complaint was lodged against Petitioner): "What's next?" Given the extensive, documented communication between Schaedler and Lt. Holloway, little doubt remains as to their police-agent relationship. Schaedler therefore was acting as Lt. Holloway's agent while Petitioner was what Holloway himself characterized as the focus of the murder investigation. And on April 5, 1975, Petitioner was arrested and charged with the murder based on the information provided Holloway by Schaedler.

As with Schaedler, the record reveals that Edward Klusewitz, the other jailhouse

informant, also acted as a police agent on behalf of Holloway, though subsequent to Petitioner's arrest. While incarcerated at the Schuylkill County Prison in April 1975, Klusewitz testified he was transported to the Spring Township (Berks County) police department and charged with eleven burglaries. There, as he was in a holding cell for two days, Lt. Holloway and another officer visited him and stated their desire for information on Petitioner. According to Klusewitz, he was even offered a six to thirty-six month sentence on the pending burglary charges, which Lt. Holloway denied. The next morning Klusewitz was returned to the Schuylkill County Prison. Within a week, Petitioner was arrested for the murder (on April 5, 1975) and housed not in the Berks County Prison, the county having

jurisdiction, but rather in the Schuylkill County Prison where he was placed in a cell directly opposite Klusewitz'.

Although the affiant at the time, Trooper Robert A. Sease, testified at the PCRA hearing that Petitioner was taken to the Schuylkill County Prison upon his arrest because Schaedler had provided incriminating evidence against him, in fact, Schaedler was released from the Berks County Prison on the very day of Petitioner's arrest: April 5, 1975. This belies Trooper Sease's assertion that the reason Petitioner could not be kept at Berks County Prison (and was transferred to Schuylkill County Prison) was the possibility of reprisal against Schaedler from Petitioner. Schaedler was no longer at Berks County Prison after Petitioner's arrest. Moreover, Trooper Sease arrested

Petitioner at the PSP barracks on April 5, 1975 and arranged to have Schaedler present there as well; thus, Trooper Sease knew Schaedler was released that day.

Shortly after being housed at Schuylkill County Prison, Lt. Holloway of course began receiving notes from Klusewitz -- after Mr. Frederick's arrest and after his right to counsel had certainly attached -- containing incriminating evidence garnered from Petitioner. It was to these notes and conversations that Klusewitz testified at Petitioner's trial. All of this information was obtained as a direct result of Lt. Holloway's request and after Petitioner's arrest for the murder. There is no question that during the course of these efforts Klusewitz was acting as a police agent for Lt. Holloway.

A further examination of the record supports the inference that both Arlan Schaedler and Edward Klusewitz were acting as police agents when contacting Petitioner, Schaedler before and after his arrest and Klusewitz after his arrest. Indeed, Arlan Schaedler's first memorialized account of Petitioner's "confession" was dated March 20, 1975, and timed 8:25 p.m., shortly after Holloway's visit to the jail. In Commonwealth v. Berkheimer, supra, the Pennsylvania Supreme Court noted that the date of a police visit to an alleged agent in prison, determined by sign-in records, at least creates the inference that the police had solicited an inmate's assistance on that date. Id., 460 A.2d at 235. Arlan Schaedler's first contact as an agent predated Petitioner's arrest, and thus any

right to counsel cannot be said to have attached with certainty according to current Federal interpretation. Yet, Petitioner indisputably was the chief suspect in the murder at that time, as Lt. Holloway admitted, he was already in custody, and the complaint was filed a scant 15 days later -- on April 4, 1975. As this Court has held:

> Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." United States v.

> Wade, 388 U.S. 218, 224, 18 L.Ed.2d 1149, 87 S.Ct. 1926 91967) (quoted in United States v. Gouveia, 467 U.S. 180, 189, 81 L.Ed.2d 146, 104 S.Ct. 2292 (1984).

Maine v. Moulton, supra, 106 S.Ct. at 484, 88 L.Ed.2d at 492. This is the case here: by securing the statements through Schaedler, although technically prior to arrest and before the right to counsel had clearly attached, the Commonwealth was able to ensure an airtight case against Mr. Frederick, thereby reducing trial "to a mere formality," just as the Supreme Court envisioned.

Regarding Schaedler, this Court has not foreclosed the possibility that counsel may and should attach in certain pre-

indictment situations. This is one. Why should the right to counsel attach in certain pre-arrest scenarios? The need to preserve the right to counsel from circumvention by covert police activity is the most important policy consideration supporting the attachment of this right in certain pre-indictment situations. Here, Petitioner was the prime suspect in the murder. Knowing this the police undertook an extraordinary effort, documented above, to elicit a confession from him through the employ of an agent and make an airtight case against him before actually filing a criminal complaint. When a defendant is the primary focus of an investigation and is incarcerated for unrelated reasons, he ought to be afforded the same right to counsel as after arrest; otherwise that right is

effectively nullified by undercover policy activity.

Second, acknowledgment of such a right would preserve the integrity of admissions or confessions in fact obtained on the inside. Arlan Schaedler was acting as a professional snitch, making a business out of garnering "confessions" and then relating them to the police in exchange for leniency on his own charges. Klusewitz, keep in mind, has recanted his confession, admitting that he and Schaedler had lied at Petitioner's trial. (The state trial court refused to accept the recantation.) Only the jury was ignorant of the inherent unreliability of the jailhouse confessions related to them, and such confessions <u>are</u> inherently unreliable and an affront to the truth-determining process of a jury trial.

To combat this increasing problem in the criminal justice system, the state of California, for example, has recently enacted a statutory bar to the eliciting of incriminating statements by the police from jailed defendants through "in-custody informants." The legislative impetus to this statute emanated from the celebrated case of a Los Angeles County jail inmate who admitted he routinely lied at many trials, claiming fellow inmates had confessed to him, in return for leniency. Enacted in 1989, Section 4001.1(b) of the California Penal Code on "In-custody informant; payment; elicit incriminating remarks" states:

> No law enforcement agency and no in-custody informant acting as an agent for the

> agency, may take some action, beyond merely listening to statements of a defendant, that is deliberately designed to elicit incriminating remarks.

An "in-custody informant" is defined as "a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution." California Penal Code, section 1127(a). California has recognized the important public policy benefit to be derived from statutorily prohibiting obtaining such confessions by making it illegal outright. (This Honorable Court, most recently in Illinois v. Perkins, 495 U.S. 292, 110 L.Ed.2d 243, 110 S.Ct. 528

(1990), has refused to apply Miranda safeguards to prison settings as a matter of course. See "Ilinois v. Perkins: Has Our Criminal Justice System Turned from "Accusatorial" to "Inquisitorial"?", 42 U.Pitt.L.R. 669 (Spring 1991)).

Failing to consider this claim will result "in a fundamental miscarriage of justice." Coleman v. Thompson, 111 S.Ct. 2546, 2565 (1991). For too long too many have been convicted, like Petitioner, through the use of "confessions" elicited on the inside by fellow inmates acting at the behest of the police, inmates often well known to judges and prosecutors alike as nothing but professional liars; the only ones not to know are the most important -- the jurors. Indeed, the affiant here, who retained the services of Klusewitz and

Schaedler, candidly testified at the evidentiary hearing that he would put Schaedler "in the same class as Klusewitz, they're both liars."

Conclusion

WHEREFORE, Petitioner, Steven D. Frederick, respectfully requests that Your Honorable Court grant this writ and consider his appeal on the merits.

RESPECTFULLY SUBMITTED:

William C. Costopoulos, Esquire
COSTOPOULOS, FOSTER & FIELDS
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Lemoyne, Pennsylvania 17043
Phone: (717) 761-2121
COUNSEL OF RECORD FOR PETITIONER

DATED: August 3, 1994.

APPENDIX

Page

Judgment Order of the United States Court of Appeals for the Third Circuit, entered on May 5, 1994, affirming the judgment of the District Court A48

Order of the Third Circuit dated October 26, 1993, granting the certificate of probable cause A50

Order of the District Court for the Eastern District of Pennsylvania dated February 8, 1993, denying the petition for writ of habeas corpus and certificate of probable cause for appeal A51

Order and Opinion of the Magistrate Judge of the District Court dated December 9, 1992, recommending the denial of the petition for writ of habeas corpus and certificate of probable cause for appeal A53

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

FREDERICK,
Petitioner

v. No. 93-1255

STEPANIK, et al.

BEFORE: SLOVITER, CHIEF JUDGE, HUTCHINSON AND SEITZ, CIRCUIT JUDGES

JUDGMENT ORDER

After exhausting his state court remedies without success, Steven D. Frederick ("petitioner"), a state prisoner serving a life term for murder, filed a petition in the district court seeking a writ of habeas corpus. It was referred to a magistrate-judge.

Petitioner raised two constitutional grounds for the issuance of the writ. The

magistrate-judge recommended that the district court deny a writ, which it did. Petitioner appeals.

Petitioner advances two constitutional issues, both involving ineffective assistance of counsel in the state proceedings.

Given the record in the state proceedings, we find no error in not affording petitioner a separate evidentiary hearing. Next, the record does not show a constitutional violation. It is,

ADJUDGED AND ORDERED that the judgment of the district court entered February 16, 1993, be and is hereby affirmed.

BY THE COURT:

/s/
Circuit Judge

DATED: May 5, 1994.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

FREDERICK,
Petitioner

v. No. 93-1255

STEPANIK, et al.

ORDER

The foregoing request for a certificate of probable cause is granted.

BY THE COURT:

/s/
Circuit Judge

DATED: October 26, 1993.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK,
Petitioner

vs. No. 92-5305

STEPANIK, et al.

TROUTMAN, S.J.

ORDER

AND NOW, this 8th day of February, 1993, upon careful and independent consideration of the petition for writ of habeas corpus, and after careful review of the Report and Recommendation of United States Magistrate Judge James R. Melinson (Doc. #6) and the objections thereto (Doc. #7), IT IS ORDERED that:

1. The Objections are OVERRULED;

2. The Report and Recommendations is

APPROVED and ADOPTED as the opinion of the Court;

3. The petition for writ of habeas corpus is DENIED and DISMISSED without an evidentiary hearing; and

4. There is no probable cause for appeal.

/s/
E. Mac Troutman, S.J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK,

vs. No. 92-5305

STEPANIK, et al.

JAMES R. MELINSON
U.S. MAGISTRATE JUDGE

Before this court is a counselled petition for a writ of habeas corpus, filed by Steven D. Frederick, pursuant to 28 U.S.C. §2254. Frederick is currently incarcerated at the State Correctional Institute [sic] at Dallas, Pennsylvania. For the reasons set forth below, it is recommended that Frederick's petition be denied and dismissed without an evidentiary hearing.

FACTS AND PROCEDURAL HISTORY

On May 23, 1977, Frederick was convicted of first-degree murder, burglary, aggravated assault, robbery and theft by unlawful taking in the Court of Common Pleas, Berks County, Pennsylvania. Frederick's post-trial motions were denied, and he was sentenced to life in prison.

Frederick filed a direct appeal to the Supreme Court of Pennsylvania on July 3, 1980. Frederick's appeal was denied per curiam on May 27, 1983.

On December 2, 1988 Frederick filed a Post Conviction Relief Act ("PCRA") petition with the Court of Common Pleas of Berks County. The PCRA court denied Frederick's petition on March 28, 1989. Commonwealth v. Frederick, Court of Common Pleas of Berks County, No. 743-75 (1990). The Superior Court of Pennsylvania affirmed the PCRA

court on July 23, 1990. Commonwealth v. Frederick, 404 Pa.Super. 646, 580 A.2d 1163 (1990). The Supreme Court of Pennsylvania granted allocatur and, after the filing of briefs and oral argument, affirmed the Superior Court per curium [sic] on February 14, 1992. Commonwealth v. Frederick, 601 A.2d 807 (Pa.1992). In the instant habeas petition, Frederick raises the following two issues:

1) That trial counsel was ineffective for advising Frederick not to testify and for failing to obtain a ruling on the admissibility of Frederick's prior criminal record; and

2) That trial counsel was ineffective for not attempting to suppress the trial testimony of two jailhouse informants, and that appellate counsel was ineffective for

not raising the admission of the testimony into evidence as an error on direct appeal.

DISCUSSION

Before a state prisoner may seek habeas corpus relief in federal court, he must exhaust all available state court remedies and afford the state courts a meaningful opportunity to consider his claims. 28 U.S.C. §2254(b); Vasquez v. Hillery, 474 U.S. 254 (1986); Picard v. Connor, 404 U.S. 270 (1971). Exhaustion does not require that the highest state rule on the merits, but it does require that the court be given the opportunity to review them. Bond v. Fulcomer, 864 F.2d 306 (3d Cir.1989). Because Frederick has presented his claims to the Supreme Court of Pennsylvania, he has satisfied the exhaustion requirement of 28

U.S.C. §2254(b).

However, the instant case requires further analysis of the claims presented because it appears that Frederick has procedurally defaulted on one of his claims. Federal courts generally may not review a state court's denial of a state prisoner's federal constitutional claim if the state court's decision rests on a state procedural default that is independent of the federal question and adequate to support the prisoner's continued custody. Coleman v. Thompson, 111 S.Ct. 2546, 2554 (1991). Where petitioner's procedural default prevents a state appellate court from hearing a habeas claim, "there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which petitioner

actually presented his claims." Coleman, 111 S.Ct. at 2257 n. 1 (citing Harris v. Reed, 489 U.S. 255, 269-270 (1989) (O'Connor, J., concurring); Teague v. Lane, 489 U.S. 288, 297-298 (1989)). This result is in accord with a policy of "recognizing the important interest in finality served by state procedural rules, and the significant harm that results from the failure of federal courts to respect them." McClesky v. Zant, 111 S.Ct. 1454, 1468 (1991).

On appeal from the PCRA court, the Superior Court of Pennsylvania determined that Frederick waived the issue that trial counsel was ineffective for advising Frederick not to testify and for failing to obtain a ruling on the admissibility of Frederick's prior criminal record. Commonwealth v. Frederick, 404 Pa.Super.

646, 580 A.2d 1163 (1990). The court based its decision on Section 9544(b) of the Post Conviction Relief Act, which provides:

> (b) Issues Waived - For the purposes of this subchapter, an issue is waived if: (1) The petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually initiated under the subchapter.

42 Pa.C.S.A. §9544(b).

The Superior Court determined that because this issue was not raised in post trial motions, which was the "earliest state in the proceedings when counsel, whose

ineffectiveness was being challenged, no longer represented the petitioner," Commonwealth v. Frederick, 404 Pa.Super. 646, 580 A.2d 1163 (1990) (quoting Commonwealth v. Webster, 490 Pa. 322, 325, 416 A.2d 491, 492 (1980)), this issue was effectively waived.

As a result, Frederick's procedural default on this issue forecloses review of this claim in federal habeas proceedings unless Frederick can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 111 S.Ct. at 2565.

In the instant habeas petition, Frederick has not alleged cause or prejudice

for his failure to present the waived issue in his appeal immediately following the dismissal of trial counsel. Frederick also fails to offer any evidence that this court's waiver of those issues will result in a "fundamental miscarriage of justice." A petitioner's failure to allege "cause and prejudice" will result in forfeiture of a claim that the waiver is a fundamental miscarriage of justice." Teague v. Lane, 489 U.S. at 297-298 (1989).

Frederick's remaining claim, that trial counsel was ineffective for not attempting to suppress the trial testimony of two jailhouse informants during Frederick's trial, and that appellate counsel was ineffective for not raising the admission of the testimony into evidence as an error on direct appeal, is without merit. Frederick

claims that the informants were acting as agents for the state police when the informants solicited statements from Frederick in violation of Miranda. In support of this claim, Frederick points to letters allegedly written by two jailhouse informants stating that the informants were solicited by the police to incriminate Frederick, and to the recantation testimony at the PCRA hearing of one of the jailhouse informants. [Footnote 1: In his petition, Frederick represents that he made substantial efforts to secure the presence of both jailhouse informants at the PCRA hearing, but that he has reason to believe that one of the informants is deceased. Petition for Writ of Habeas Corpus, page 10.] The PCRA court considered the letters and the testimony in March, 1989. See

Commonwealth v. Frederick, Court of Common Pleas of Berks County, No. 743-75 (1990), Appendix to Petition for Writ of Habeas Corpus, Volume 1, pages 23a-59a, 79a-92a. The letters and the recantation testimony were submitted as evidence more than ten years after Frederick's trial, and six years after his last direct appeal was denied.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court of the United States formulated a two pronged test to evaluate claims of ineffective assistance of counsel. Under the Strickland test, in order to support a claim of ineffective assistance of counsel, Frederick must show that counsel's performance was deficient, and that the deficient performance so prejudiced the defense as to deprive Frederick of a fair trial. Strickland, 466

U.S. at 687.

In assessing the deficiency of counsel's performance, the Supreme Court adopted a reasonableness standard guided by the prevailing professional norms of practice. Id. at 688. See also Gov't of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir.1989) (test is reasonableness under prevailing professional standards). The Supreme Court instructed:

> a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or

omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omission were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to

> have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 690.

In the instant case, counsel's failure to attempt to suppress the testimony of the jailhouse informants and failure to raise the admission of the testimony as an error on direct appeal was not unreasonable. "A habeas corpus petitioner cannot demonstrate prejudice from counsel's failure to object unless there is a legally supportable argument for excluding the statements." See U.S. ex rel. Link v. Link, 811 F.2d 1166, 1168 (7th Cir.1987). Because neither Frederick's trial counsel nor his appellate counsel possessed any evidence on which to move to purge the jailhouse informants'

testimony from the record, any objection in trial or argument on appeal concerning the testimony would have been plainly lacking in merit. Because a legal argument cannot be sustained unless it is grounded in existing facts or evidence, neither trial counsel's decision not to attempt to suppress the trial testimony of the informants as agents for the police nor appellate counsel's failure to argue on appeal that the testimony was wrongly admitted into evidence constitutes ineffective assistance.

Even is this court assumed, for the sake of argument, that trial and appellate counsel's performances were deficient, Frederick's ineffectiveness claim would fail because no prejudice resulted from the admission of the informants' testimony into evidence. Frederick was not prejudiced by

the admission of the informants' testimony because the recantation testimony and the letters are unreliable.

The PCRA court, following a full evidentiary hearing, was "not at all satisfied with the truthfulness of the testimony" and determined that the recantation testimony lacked credibility. Commonwealth of Pennsylvania v. Steven D. Frederick, Court of Common Pleas of Berks County, No. 743-75 (1990). The PCRA court stated, "recantation testimony is considered extremely unreliable and it is the duty of the trial court to deny a new trial unless satisfied such testimony is true." Commonwealth v. Bernstein, 309 Pa.Super. 573, 455 A.2d 1232 (1983) (citing Commonwealth v. Gaddy, 492 Pa. 434, 424 A.2d 1268 (1981); Commonwealth v. Nelson, 484 Pa.

11, 398 A.2d 636 (1979); Commonwealth v. Coleman, 438 Pa. 373, 264 A.2d 649 (1970)). On appeal, the Superior Court of Pennsylvania found that the PCRA court properly rejected the recantation testimony.

In federal habeas review, the credibility findings of the state PCRA court are given a "presumption of correctness." Landano v. Rafferty, 856 F.2d 569 (3d Cir.1988). In Landano, the United States Court of Appeals for the Third Circuit stated that a "[h]earing in state post conviction proceedings, in which it was determined that a witness's recantation of his prior identification was not credible, comported with due process standards, so that determination was entitled to a presumption of correctness in federal habeas corpus proceedings." Id. at 569.

This court accords deference to the PCRA court's finding that the evidence presented by the recantation testimony and letters was not credible. Taking the lack of credibility of the letters and the recantation testimony into consideration, this court concludes that the admission of the trial testimony of the jailhouse informants into evidence did not prejudice Frederick because the evidence that the informants were police agents was unreliable.

Frederick has had the opportunity to fully litigate the issue of trial counsel's ineffectiveness for failing to attempt to suppress the informants' testimony and appellate counsel's ineffectiveness for failing to raise the admission of the testimony into evidence as an error in the

Philadelphia [sic] Court of Common Pleas, the Superior Court of Pennsylvania, and the Supreme Court of Pennsylvania. No due process violation has been committed.

Therefore, I make the following:

R E C O M M E N D A T I O N

AND NOW, this 9th day of December, 1992, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED and DISMISSED without an evidentiary hearing. There is no probable cause for appeal.

BY THE COURT:

/s/
JAMES R. MELINSON
U. S. M. Judge